



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO.311 OF 2007

IN THE MATTER OF THE ESTATE OF CHESIRE CHEBUNGEI (DECEASED)

JOSEPH K. CHESIRE.....PETITIONER

VERSUS

KIPSANAI PRIMARY SCHOOL.....OBJECTOR

AND

MOSES ARAP SEGITE.....INTERESTED PARTY

RULING

1. The petitioner herein filed summons dated the 26th of June 2019 pursuant to *Articles 27 and 50 of the Constitution* and *Rule 73 of the Probate and Administration rules* seeking to have the Objector's summons dated the 5th of August 2013 struck out for being scandalous, vexatious and failing to disclose a reasonable cause of action.

2. The petitioner's main contention is that the issues raised in the objection which seeks to revoke grant issued to the interested party herein in Eldoret CMCC 128 OF 2011, were the subject of the proceedings in Eldoret CMCC 128 of 2011 which matter was concluded in favour of the interested party and against the objector and a valid decree issued on the 17th of December 2012.

3. The application is supported by the affidavit of Joseph Chesire, the petitioner herein, sworn on even date wherein he deponed that pursuant to the confirmed grant, the suit property known as Mosop/Lelboinet/533 and which belonged to the deceased (Chesire Chebungei) was vested upon the interested party by virtue of purchaser's interest. Further, the petitioner deponed that following the said confirmation by this court, the interested party moved the court via Eldoret CMCC 128 of 2011 seeking orders of eviction against the objector from the suit property which was granted by court by way of decree issued on the 17th of December 2012. The court affirmed the interested party as the rightful proprietor of the suit property.

4. The petitioner also averred that the objector herein participated in the said proceedings through its Board of Governors and that no appeal has ever been preferred against the said decree.

5. It was further averred by the petitioner that the objector herein commenced objection proceedings by way of summons filed on the 7th of August 2013 seeking the revocation of the grant issued to the interested party on grounds that the same was obtained fraudulently. However, the petitioner contends that the issues raised in the objection filed, were the subject of the proceedings in Eldoret CMCC 128 of 2011 and which was concluded. In the same vein, the petitioner avers that the court in the current succession proceedings held in its ruling dated the 28th of May 2019 that what was pending before court was only the application dated the 15th of October 2018 of which it dismissed.

6. Consequently, the petitioner opines that the existence of the objection proceedings is an abuse of court process and that the proceedings are disguised as an appeal seeking to overturn a valid decree of court. Further, the petitioner avers that the suit as presented is res-judicata and ought to be struck out in the interest of justice and the estate of the deceased.

7. The Objector has not filed any replying affidavit or grounds of opposition to the Petitioner's application despite being served through its counsel. There is however another application dated 27th of August 2019 by Limo R.K & Company Advocates seeking that they be allowed

to cease acting for the objector on grounds that that objector has not provided instructions to them and that the objector has stopped calling and or in any way communicating with its advocates thus leaving them in darkness and not knowing how to proceed. There is also no indication that the objector has attempted to move this court further in terms of progressing their case.

8. On the 19th of July 2021 when the matter came up for mention, counsel for the interested party noted that he is not opposed to the application.

9. On the same date, Mr. Tororei, counsel for the Petitioner made oral submissions submitting that the Objector Summons dated the 5th of August 2013 be struck out as it is scandalous and an abuse of court process. Further, counsel submitted that the matter has already been decided in Eldoret CMCC 128 of 2011 where the objector was the interested party. It was further submitted that the court in CMCC 128 of 2011 found in favour of the interested party herein and declared the objector as trespasser and a decree issued for eviction of the objector herein.

10. Counsel also submitted that the subject matter is the same land as is in this succession cause and submitted that the objector having not appealed the CMCC case cannot raise the same issues in objection proceedings. Thus, counsel submitted that the case is closed and the summons should thus be struck out with costs.

Analysis and Determination

11. The only issue for determination is whether the Objector's Summons dated the 5th of August 2013 should be struck out.

12. As rightly held in *Termco Tank Kenya Ltd v Nyoro Construction Co. Ltd [2004] eKLR* a pleading is scandalous if it alleges indecent, offensive or improper motives against the opposite party which are unnecessary in the proof of the action pleaded. It is frivolous or vexatious when it lacks seriousness and tends to annoy. A frivolous claim is ex post facto vexatious as nobody can fail to be annoyed by a baseless allegation against him.'

13. I do not believe that there is anything scandalous about the Objector's Summons. However, I find that the same is not serious and is only meant to delay the execution of the decree issued by court in

Eldoret CMCC 128 of 2011 and extend the illegal stay of the school in the petitioner's land. This is because, having perused the summons by the objector together with his evidence, I find that the issues raised therein are the same issues that were raised in Eldoret CMCC 128 of 2011 and which under law is res judicata.

14. The doctrine of *res judicata* is set out in *Section 7* of the *Civil Procedure Act* and ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

15. A close reading of *Section 7* of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. That the former suit was between the same party or parties under whom they or any of them claim.

iii. That those parties were litigating under the same title.

iv. That the issue in question was heard and finally determined in the former suit.

v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

16. In the present case, the issues raised herein were substantially the same issues in the Eldoret CMCC 128 of 2011. Furthermore, the parties were the same and the issues raised herein were properly canvassed and heard with the court dismissing the same and holding in favour the petitioner herein. I thus find that indeed the current matter is res-judicata.

17. Furthermore, there is every indication that the objector is not interested in the quick disposal of the matter as it has not provided its advocates with instructions to enable him proceed and hence the application from its advocates seeking to cease acting for the objector.

18. Consequently, application is merited and is herein allowed with costs to the plaintiff.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF AUGUST, 2021.

In the absence of:-

Jean Kiroka for the respondent

Mr. Tororey for the applicant

Mr. Keter holding brief for Mr. Mwinamo for the interested party (present)

Ms Gladys – Court assistant